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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

LEON WILLIAMS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 924(c) of Title 18 requires specified mandatory consecutive sentences for committing certain weapons offenses in connection with "any crime of violence or drug trafficking crime," "[e]xcept to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law."

The question presented is whether the "except" clause prohibits imposition of a Section 924(c) sentence if the defendant is also subject to a greater mandatory minimum sentence on a different count of conviction charging a different offense for different conduct.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 558 F.3d 166.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 2009. A petition for rehearing was denied on June 22, 2009. (App, *infra*, 31a). On September 10, 2009, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including October 20, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 924(c) of Title 18 of the United States Code is reproduced in the appendix to this petition. App., *infra*, 32a-35a.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, respondent was convicted of possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(g); possessing with intent to distribute over 50 grams of crack cocaine in violation of 21 U.S.C. 841(b)(1)(A); and possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A). The district court sentenced respondent to a total of 195 months of imprisonment, including a consecutive term of five years on the Section 924(c) conviction, to be followed by five years of supervised release. App., *infra*, 1a, 3a. The court of appeals remanded to the district court for resentencing on the ground that, *inter alia*, the text of Section 924(c) exempted respondent from any separate sentence for his conviction under that statute. *Id.* at 1a-20a.

1. In February 2006, two police officers saw respondent urinating next to a car parked by the side of the road. As the officers approached, they observed in the car multiple cellular phones, wads of cash wrapped in rubber bands, and a plastic bag containing white residue. After arresting respondent and impounding the car, the officers conducted an inventory search, during which they discovered a hidden compartment containing a loaded gun, a gun magazine, bullets, and 180 small bags of powder and crack cocaine. The white residue was later determined to be narcotics, and respondent's

fingerprints were found on the gun magazine. Respondent later admitted that he had been driving the car, which was registered to his sister, and that the cellular phones and cash belonged to him. App., *infra*, 2a-3a.

2. In April 2006, a grand jury sitting in the Southern District of New York indicted respondent on three counts: possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(g); possessing with intent to distribute 50 grams or more of crack cocaine, in violation of 21 U.S.C. 841(b)(1)(A); and possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A). In October 2006, respondent was tried before a jury, which found him guilty on all three counts. Gov't C.A. Br. 1-2; App., *infra*, 3a.

3. The district court sentenced respondent to a total of 195 months of imprisonment. App., *infra*, 3a. Respondent was subject to two separate mandatory minimum sentences: a ten-year mandatory minimum for the drug trafficking count pursuant to Section 841(b)(1)(A) and a consecutive five-year mandatory minimum for the Section 924(c) count. *Ibid.*; see 18 U.S.C. 924(c)(1)(A) (providing that, except where a greater minimum penalty applies, any person who possesses a firearm in furtherance of a crime of violence or drug trafficking crime shall, "in addition to the punishment provided for such crime of violence or drug trafficking crime," be sentenced to a "term of imprisonment of not less than 5 years"). The district court imposed a 120-month sentence for the felon-in-possession count, a concurrent 135-month sentence for the drug trafficking count, and

the mandatory consecutive five-year term for the Section 924(c) count. App, *infra*, 3a, 22a.[1]

4. The court of appeals affirmed respondent's conviction but vacated his sentence and remanded for resentencing without any separate term of imprisonment for the Section 924(c) conviction. App., *infra*, 1a-20a.

a. After respondent filed an appeal but before oral argument, the court of appeals decided *United States* v. *Whitley*, 529 F.3d 150 (2d Cir. 2008). *Whitley* interpreted the introductory, "except" clause of Section 924(c)(1)(A), which states in relevant part:

> *Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law*, any person who, during and in relation to any crime of violence or drug trafficking crime * * * uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

---

[1] The court of appeals incorrectly stated that the district court sentenced respondent on the felon-in-possession count to 130 months, which would have exceeded the statutory maximum of 120 months under 18 U.S.C. 922(g) and 924(a)(2). App., *infra*, 3a.

> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. 924(c)(1)(A) (emphasis added). The defendant in *Whitley* was convicted of three offenses arising from a single robbery: a Hobbs Act violation, which carried no mandatory minimum sentence; a violation of 18 U.S.C. 922(g) for possessing a firearm as a convicted felon, which carried a 15-year mandatory minimum sentence under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e); and a Section 924(c) offense, which carried a ten-year mandatory minimum consecutive sentence because the defendant had discharged the firearm during the robbery, see 18 U.S.C. 924(c)(1)(A)(iii). *Whitley*, 529 F.3d at 151-152.

The Second Circuit construed the introductory language of Section 924(c) to mean that Whitley was exempt from any sentence for his Section 924(c) conviction because he was subject to a greater mandatory minimum sentence under the ACCA. *Whitley*, 529 F.3d at 151. The court adopted what it considered to be a "literal" reading of Section 924(c)'s "except" clause, reasoning that "the ten-year minimum sentence required by subdivision (iii) of that subsection for discharge of a firearm * * * does not apply to [the defendant] because, in the words of th[e] ['except'] clause, 'a greater minimum sentence is otherwise provided by . . . any other provision of law,' namely, [the ACCA], which subjects him to a fifteen-year minimum sentence." *Id.* at 153.

In reaching that conclusion, the court of appeals rejected the government's contention that the "except" clause refers only to mandatory minimum penalties provided for the Section 924(c) offense, and that the court's

contrary construction departs from the statute's plain meaning, conflicts with Congress's evident intent, and would anomalously result in shorter mandatory sentences for more serious offenders. *Whitley*, 529 F.3d at 155. The court noted in *dicta*, however, that the anomalies the government identified "could be overcome if the 'except' clause were limited to higher minimums contained only in firearms offenses, rather than, as it reads, to higher minimums provided 'by any other provision of law.'" *Ibid.*

b. Following the decision in *Whitley*, the court of appeals ordered supplemental briefing and heard argument concerning the effect of that ruling on respondent's sentence. 07-2436 Docket entry (2d Cir. July 16, 2008). The court then held that the reasoning in *Whitley* also applies to a case such as this one, in which the defendant is subject both to a mandatory minimum sentence under Section 924(c) and to a higher mandatory minimum for the predicate crime of violence or drug trafficking crime. App., *infra*, 2a.

The court first rejected the contention that *Whitley* may be limited either to its particular facts—involving multiple mandatory minimum sentences based on the use of a single firearm—or to mandatory minimums arising from firearms offenses more generally. App., *infra*, 6a-7a. In the court's view, the phrase "any other provision of law" in Section 924(c)(1)(A) reaches beyond firearms statutes to the entire "set of crimes for which mandatory minimum sentences apply," including "drug trafficking crimes [and] other violent offenses." *Id.* at 8a-9a. The court reasoned that this conclusion is compelled by the text of the "except" clause, which "means what it literally says." *Id.* at 8a (citation omitted). At the same time, however, the Court cautioned that the

"except" clause is not "unbounded." *Id.* at 9a. The court stated that reading "any other provision of law" literally "to include, for example, provisions under which a defendant was already sentenced for a prior unrelated crime in a previous case, would be suspect." *Id.* at 10a. The court therefore held that application of the "except" clause controls only when the defendant faces a higher mandatory minimum sentence for a different offense "arising from the same criminal transaction or operative set of facts" as the Section 924(c) offense. *Ibid.*

The court acknowledged that Section 924(c)(1) requires that the sentences it prescribes must be in addition to, and may not run concurrently with, any sentence imposed for the predicate crime of violence or drug trafficking crime. App, *infra*, 10a-11a (citing 18 U.S.C. 924(c)(1)(A) (providing that the prescribed penalties are "in addition to the punishment provided for such crime of violence or drug trafficking crime"); 18 U.S.C. 924(c)(1)(D)(ii) (stating that, "[n]otwithstanding any other provision of law * * * no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed"). The court concluded, however, that its interpretation did not violate these provisions. The court reasoned that the introductory clause of Section 924(c) carves out an exception to the "in addition to" requirement: when the "except" clause applies—*i.e.*, when a defendant is subject to a higher minimum sentence for a different offense—the defendant receives no sentence at all under Section 924(c)(1)(A), so the Section 924(c)

"sentence" is not "concurrent" with any other term of imprisonment. App., *infra*, 11a-12a.

The court also acknowledged that its interpretation of Section 924(c) might lead to the anomalous result that a defendant could be subject to a lower total mandatory sentence as a result of committing a more serious predicate drug crime. App., *infra*, 15a-16a. But the court reasoned that any such anomaly may be remedied by the sentencing court in the exercise of its discretion to fashion an appropriate punishment in the particular case. *Id.* at 16a-17a. And the court further concluded that, in any event, it was up to Congress to correct anomalies that result from what the court believed to be a literal reading of the statute. *Id.* at 17a.

Applying this interpretation of the "except" clause, the court held that, because respondent was subject to a ten-year mandatory minimum sentence under Section 841(b)(1)(A), he was exempt from the five-year mandatory minimum under Section 924(c)(1)(A). App., *infra*, 19a-20a. The court therefore remanded for resentencing without any sentence for respondent's Section 924(c) offense. *Ibid.*[2]

5. On April 24, 2009, the government petitioned for rehearing en banc, contending that the decision below is incorrect and noting that it conflicts with the decisions of every other court of appeals to address the issue. The court denied that petition without comment. App., *infra*, 31a.

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[2] The court of appeals also remanded for the district court to consider its authority to impose a non-guidelines sentence based on the disparity between the crack and powder cocaine offenses. App., *infra*, 19a-20a.

REASONS FOR GRANTING THE PETITION

In the decision below, the court of appeals extended *United States* v. *Whitley*, 529 F.3d 150 (2d Cir. 2008), to hold broadly that the mandatory minimum penalties prescribed in Section 924(c) do not apply when the defendant also faces a higher mandatory minimum sentence for another count of conviction. Under the Second Circuit's holding, when a defendant is convicted of a drug trafficking crime carrying a ten-year mandatory minimum and a Section 924(c) offense carrying a five-year mandatory minimum, the district court is required to sentence the defendant to zero months of imprisonment on the Section 924(c) offense. That interpretation of Section 924(c) is incorrect and implicates an entrenched conflict among the courts of appeals. Eight other courts of appeals have considered the meaning of the introductory "except" clause of Section 924(c)(1)(A), and all of them have rejected the interpretation adopted in the decision below. Those courts have correctly reasoned that the "except" clause does not displace the penalties of Section 924(c) whenever a defendant also faces a higher minimum sentence for a different offense. Because the meaning of Section 924(c)(1)(A)'s introductory clause is an important question in federal prosecutions and is squarely presented in this case, this Court's review is warranted.

A. The Court Of Appeals' Interpretation Of Section 924(c)(1)(A) Is Incorrect

The Second Circuit has fundamentally misconstrued the introductory language of Section 924(c)(1)(A). As other courts of appeals to consider the question have concluded, the "except" clause means that a defendant convicted of an offense under Section 924(c)(1)(A) must

be sentenced to the five-year mandatory minimum term set forth in that provision unless another penalty provision elsewhere in Section 924(c) or "the United States Code[] requires a higher minimum sentence for *that* § 924(c)(1) offense." *United States* v. *Easter*, 553 F.3d 519, 526 (7th Cir. 2009) (per curiam), petitions for cert. pending, No. 08-9560 (filed Mar. 26, 2009), and No. 08-10584 (filed May 20, 2009); see pp. 18-19, *infra*. The "except" clause does not mean that a defendant escapes any punishment for a Section 924(c) conviction whenever he is subject to a higher mandatory sentence for a *different* offense. The decision below departs from the plain meaning of Section 924(c)(1)(A), frustrates Congress's intent, and creates anomalies both within the statute and in its practical application.

1. The prefatory clause of Section 924(c)(1)(A) provides that a defendant who violates that statute must be sentenced to at least five years of imprisonment "[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law." 18 U.S.C. 924(c)(1)(A). "The except clause * * * does not say 'a greater minimum sentence' *for what*; yet it must have *some* understood referent to be intelligible." *United States* v. *Parker*, 549 F.3d 5, 11 (1st Cir. 2008), cert. denied, 129 S. Ct. 1688 (2009). Read naturally, the "understood referent" of the clause is the offense set forth in the language that immediately follows: using, carrying, or possessing a firearm in connection with a crime of violence or a drug trafficking crime. See *United States* v. *Ressam*, 128 S. Ct. 1858, 1860 (2008) (noting that the plain meaning of a statute is the "most natural reading of the relevant statutory text."); *Easter*, 553 F.3d at 526 ("In the contest between reading the 'except' clause to refer to penalties for the offense in

question or to penalties for any offense at all, we believe the former is the most natural.").

The clause therefore provides that, except to the extent that Section 924(c) or any other provision of law provides a greater minimum sentence for using, carrying, or possessing a firearm in connection with a crime of violence or a drug offense, any person who commits that firearms offense is subject to the baseline five-year mandatory minimum term of imprisonment set forth in Section 924(c)(1)(A)(i). Thus, for example, if (as in this case) a firearm is possessed in furtherance of a drug trafficking offense, the defendant is subject to a mandatory consecutive five-year sentence; *except* that if (as in *Whitley*) the firearm is discharged during the drug trafficking crime, the defendant is instead subject to the ten-year mandatory minimum sentence under Section 924(c)(1)(A)(iii); *except* that if the discharged firearm is a machinegun, the defendant is instead subject to a 30-year mandatory minimum sentence under Section 924(c)(1)(B)(ii); *except* that if another feature of the Section 924(c) offense triggers a greater mandatory minimum penalty for that crime under "any other provision of law," the defendant is instead subject to that higher sentence on the Section 924(c) count.

This construction of the "except" clause does not "rewrit[e]" the statute or add any new words, as the court of appeals concluded. App., *infra*, 6a. It simply selects the most natural referent of the "except" clause, which is the basic crime set forth in Section 924(c)(1)(A). And it respects the purpose of that clause to ensure the imposition of the highest possible mandatory penalty for a Section 924(c) offense.

2. The statutory text does not support the court of appeals' contrary interpretation, under which the "ex-

cept" clause eliminates any Section 924(c) sentence whenever the defendant is subject to a higher mandatory minimum for a different crime "arising from the same criminal transaction or operative set of facts" as the Section 924(c) offense. App., *infra*, 10a. The court purported to rest its interpretation on a "literal reading" of the phrase "any other provision of law." *Id.* at 8a-9a. Consistent with ordinary principles of statutory construction, however, that phrase should be "given more precise content by the neighboring words with which it is associated." *United States* v. *Williams*, 128 S. Ct. 1830, 1839 (2008); see, *e.g.*, *Dolan* v. *USPS*, 546 U.S. 481, 486-487 (2006). Just as the phrase "this subsection" refers to provisions that prescribe minimum sentences for the Section 924(c) offense, so too the phrase "any other provision of law" should be read to refer to those provisions elsewhere in the United States Code that establish penalties for violating Section 924(c)(1)(A).

The absence of any provision of law outside Section 924(c) that currently prescribes such penalties does not justify the court of appeals' interpretation. As several other courts of appeals have concluded, the "'any other provision of law' language provides a safety valve that would preserve the applicability of any other provisions that could impose an even greater mandatory minimum consecutive sentence for violation of § 924(c)." *United States* v. *Studifin*, 240 F.3d 415, 423 (4th Cir. 2001). That language "simply reserv[es] the possibility that another statute or provision might impose a greater minimum consecutive sentencing scheme for a § 924(c) violation." *Ibid;* see *United States* v. *Abbott*, 574 F.3d 203, 208 (3d Cir. 2009) ("[T]he prefatory clause mentions 'any other provision of law' to allow for additional § 924(c) sentences that may be codified elsewhere in the

future."); *United States* v. *Collins*, 205 Fed. Appx. 196, 197-198 (5th Cir. 2006) (per curiam) (finding "convincing" *Studifin*'s reasoning that "by any other provision of law" provides a "safety valve" for future provisions "that could impose an even greater mandatory minimum consecutive sentence for a violation of § 924(c)") (quoting *Studifin*, 240 F.3d at 423), cert. denied, 551 U.S. 1170 (2007).[3]

Indeed, despite its professed fidelity to interpreting the "except" clause according to "what it literally says," App, *infra*, 8a (quoting *Whitley*, 529 F.3d at 153), the court of appeals itself departed from a strict "literal reading" of the phrase "any other provision of law," *id.* at 9a. Construed without any consideration of context, the "except" clause would eliminate any sentence under Section 924(c) whenever the defendant faced a greater mandatory minimum sentence for charges pending in other jurisdictions, for entirely unrelated counts, or for crimes that were the subject of a previous sentencing. The court of appeals, however, deemed "suspect" any such literal or "unbounded" reading of the clause. *Id.* at 9a, 10a. The court therefore limited the "except" clause to those "other provision[s] of law" imposing mandatory minimums for offenses that "aris[e] from the same crim-

[3] For example, suppose Congress were to amend 18 U.S.C. 922(k), which criminalizes possession of a firearm with a defaced serial number, to provide that "if a firearm with a defaced serial number is involved in a violation of Section 924(c)(1)(A), then the penalty for such a violation of Section 924(c)(1)(A) is at least 15 years." The "except" clause would make clear that the penalty for using a firearm with a defaced serial number during a drug or violent crime, in violation of Section 924(c)(1)(A), would be a minimum of 15 years of imprisonment (rather than any lower minimum set forth in Section 924(c) itself), which (under Section 924(c)(1)(D)(ii)) would be consecutive to whatever sentence the defendant received for the Section 922(k) offense.

inal transaction or operative set of facts" as the Section 924(c) offense. *Id.* at 10a. That interpolation appears nowhere in the statutory text, and, as this Court has remarked on numerous occasions, "same transaction" tests (or other similar formulations) are inherently malleable and indeterminate. See, *e.g.*, *United States* v. *Dixon*, 509 U.S. 688, 710-711 (1993). The court's insertion of that test into the statute was also unnecessary. The "unbounded" reading of the "except" clause the court was trying to avoid arose only because the court failed to observe the limitation inherent in the statute itself—that the clause applies only where another provision prescribes a greater mandatory minimum for the Section 924(c) offense.

3. In addition to contravening the plain meaning of the relevant text, the Second Circuit's interpretation of the "except" clause ignores the history of the statute, brings that clause into conflict with other language in Section 924(c), and creates a variety of anomalies that Congress could not have intended.

a. The court of appeals' reading of the "except" clause cannot be squared with the history of Section 924(c)(1)(A). The "except" clause was added to the statute in 1998 as part of a slate of amendments intended both to broaden Section 924(c) in response to this Court's decision in *Bailey* v. *United States*, 516 U.S. 137, 150 (1995) (holding that the term "use" in Section 924(c) requires "active employment" of a firearm), and to stiffen the penalties for violating that law. The amendments accomplished the latter purpose by adding graduated minimum sentences for brandishing and discharging a firearm and for subsequent convictions under the statute. The obvious purpose of the 1998 amendments—including the "except" clause—was thus to *increase* sen-

tences for defendants who use, carry, or possess firearms in connection with other crimes. The Second Circuit's interpretation yields precisely the opposite effect, *eliminating* the Section 924(c) penalties altogether for the most serious offenders who commit predicate crimes carrying high minimum sentences. Nothing in the legislative history of Section 924(c) supports that counterintuitive result.

b. The interpretation adopted by the Second Circuit negates specific language in Section 924(c) demonstrating Congress's intent to impose additional, consecutive punishment on defendants who violate the statute. Section 924(c)(1)(A) states that a defendant who carries, uses, or possesses a firearm in connection with a crime of violence or a drug trafficking crime "shall" be sentenced to a minimum prison term "in addition to the punishment provided for such crime of violence or drug trafficking crime." Similarly, Section 924(c)(1)(D)(ii) states that, "[n]otwithstanding any other provision of law * * * no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any other term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed." The Second Circuit's approach succeeds in preventing these cumulative sentences from occurring. As the Fourth Circuit has explained, the Second Circuit's

> construction of § 924(c) simply makes no sense in light of Congress's clear intent in § 924(c) to impose mandatory consecutive sentences, as opposed to choosing between one or the other sentence, and indeed would be patently inconsistent with the intent expressed in § 924(c)(1)(D)(ii) to require mandatory

> consecutive sentences against those who commit crimes of violence while using or carrying firearms in furtherance of their crimes.

Studifin, 240 F.3d at 423.

c. The court of appeals' reading of the "except" clause effectively treats Section 924(c) as a mere sentencing enhancement that can be displaced if some greater minimum for a different offense also applies. See *Whitley*, 529 F.3d at 151 ("This criminal appeal presents the unusual situation in which the literal meaning of a *sentencing statute* has been disregarded to the detriment of a defendant.") (emphasis added). "But [Section] 924(c) does not define an enhancement, it defines a standalone crime" for using, carrying, or possessing a firearm in connection with a drug or violent offense. *Easter*, 553 F.3d at 526; see *Dean* v. *United States*, 129 S. Ct. 1849, 1853 (2009) ("The principal paragraph [of Section 924(c)] defines a complete offense."); *Harris* v. *United States*, 536 U.S. 545, 553 (2002). The result required by the decision below—a Section 924(c) conviction for which the defendant receives no sentence whatsoever—is highly anomalous. As the Seventh Circuit observed, "[a] determination of guilt that yields no sentence is not a judgment of conviction at all." *Easter*, 553 F.3d at 526.

d. The decision below would produce illogical sentencing outcomes. Consider, for example, two defendants possessing cocaine—the first possessing 500 grams and subject to a mandatory minimum sentence of five years under 21 U.S.C. 841(b)(1)(B), and the second possessing five kilograms (ten times the amount) and subject to a mandatory minimum of ten years under 21 U.S.C. 841(b)(1)(A). If the first defendant brandishes a firearm in furtherance of his drug offense, under the

decision below the "except" clause would not apply and the defendant would be subject to two mandatory minimum sentences totaling 12 years: the five-year sentence under 21 U.S.C. 841(b)(1)(B) and a consecutive mandatory minimum sentence of seven years under Section 924(c)(1)(A)(ii). But if the second defendant brandishes a firearm in furtherance of his much more serious drug offense, under the Second Circuit's view the except clause would apply, the seven-year mandatory minimum in Section 924(c)(1)(A)(ii) therefore would disappear, and the defendant would be subject to a single mandatory minimum of ten years under 21 U.S.C. 841(b)(1)(A). Thus, the more serious offender would face a lesser minimum sentence. It is inconceivable that Congress intended such a result. See *Abbott*, 574 F.3d at 209 (discussing this and other sentencing anomalies and concluding that "[w]e are confident that Congress did not intend such a bizarre result").

The court of appeals attempted to rationalize such anomalous outcomes on the ground that, where the "except" clause applies, a district judge may compensate for the elimination of the Section 924(c) sentence by exercising its discretion under 18 U.S.C. 3553(a) to increase the sentence on the underlying offense. App., *infra*, 16a-17a. But Congress added the "except" clause to Section 924(c) in 1998, seven years before this Court ruled in *United States* v. *Booker*, 543 U.S. 220 (2005), that district courts may vary from the Sentencing Guidelines to fashion an appropriate punishment in the particular case. Congress therefore could not have intended to rely on the discretion afforded by Section 3553(a) as a means of correcting anomalies resulting from the "except" clause. See *Abbott*, 574 F.3d at 210 ("Congress could not have intended to create such sentencing dis-

parities with the clairvoyant expectation that seven years later the Supreme Court would grant district judges the discretion to cure such injustices.") (citing *Booker*, *supra*); *Easter*, 553 F.3d at 526-527.

B. The Decision Below Implicates An Entrenched Conflict Within The Circuits

There is a clear and well defined conflict among the courts of appeals on the question presented. Eight other courts of appeals—the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits—have considered the meaning of the "except" clause, and none has adopted the interpretation underlying the Second Circuit's decisions in this case and in *Whitley*. Contrary to the decision below, all of those courts have rejected a reading of the "except" clause that would eliminate the sentence for a Section 924(c) offense when the defendant is subject to a higher mandatory minimum sentence for the underlying crime of violence or drug trafficking. See *United States* v. *Segarra*, No. 08-17181, 2009 WL 2932242 (11th Cir. Sep. 15, 2009) (per curiam); *Abbott*, 574 F.3d at 208-209; *United States* v. *London*, 568 F.3d 553, 564 (5th Cir. 2009), petition for cert. pending, No. 09-5844 (filed Aug. 11, 2009); *United States* v. *Pulido*, 566 F.3d 52, 65 & n.6 (1st Cir. 2009), petition for cert. pending, No. 09-5949 (filed Aug. 14, 2009); *Easter*, 553 F.3d at 525; *Parker*, 549 F.3d at 10-12; *United States* v. *Jolivette*, 257 F.3d 581, 586-587 (6th Cir. 2001); *Studifin*, 240 F.3d at 421-424; *United States* v. *Alaniz*, 235 F.3d 386, 386-390 (8th Cir. 2000), cert. denied, 533 U.S. 911 (2001). In addition, three of those circuits have held, in conflict with *Whitley*, that the "except" clause refers only to mandatory minimum sentences for the Section 924(c) offense, and does not refer to sentences for any

other count of conviction, including another firearms-related crime. See *Abbott*, 574 F.3d at 209-211; *Easter*, 553 F.3d at 524-527; *Studifin*, 240 F.3d at 421-424.

The government petitioned for en banc review in both *Whitley* and the decision below, alerting the Second Circuit to the unanimous contrary authority in the other courts of appeals. The Second Circuit denied both of those petitions, thereby indicating that it was unwilling to reconsider its interpretation of Section 924(c). This Court's resolution of the circuit conflict is now warranted.

C. The Question Presented Is Important And Squarely At Issue In This Case

1. The question presented is important to the administration of the federal criminal justice system. Because firearms are commonly used, carried, or possessed in connection with drug trafficking and violent crimes, defendants are frequently charged with violating both Section 924(c) and the statute that defines the predicate offense. In addition, recidivist offenders are often charged under both the ACCA and Section 924(c) when they employ a firearm in connection with another crime. The proper interpretation of the "except" clause determines the minimum sentence in these recurring circumstances. Under the Second Circuit's interpretation, a defendant receives no sentence for the Section 924(c) count if he is subject to a higher mandatory minimum for the ACCA violation or the predicate offense. Under the position adopted by other courts of appeals, by contrast, such a defendant is subject both to the mandatory minimum sentence for the Section 924(c) crime and the mandatory sentence for any other count of conviction. The disagreement between the Second Circuit and the

other courts of appeals therefore yields large disparities in the sentences in a significant number of cases.

2. a. This case squarely presents the issue on which the courts of appeals are divided. Respondent was convicted of violating both 21 U.S.C. 841(b)(1)(A), which carries a mandatory minimum sentence of ten years, and Section 924(c)(1)(A)(i), which requires a consecutive mandatory sentence of at least five years. Based on its interpretation of the "except" clause, the court of appeals ordered the district court to resentence respondent without any separate term of imprisonment for the Section 924(c) offense. The eight other circuits to address the issue would reach a different holding on these facts and would affirm a sentence that included both mandatory minimums.

b. Unlike other pending petitions for a writ of certiorari addressing the meaning of the "except" clause,[4] this case squarely presents that question in a de novo posture. Although respondent did not invoke the "except" clause in the district court or in his initial brief in the court of appeals, the Second Circuit applied a de novo standard of review on the ground that, "if [respondent's] reading of *Whitley* and the 'except' clause are correct, the plain error standard of review would be met." App., *infra*, 4a n.2. That conclusion was based on the government's concession to that effect in *Whitley*, see 529 F.3d at 152 n.1, which in turn rested on controlling Second Circuit decisions holding that plain error review is either "relax[ed]" or inapplicable in certain sentencing contexts. See, *e.g.*, *United States* v. *Sim-*

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[4] See *Pulido* v. *United States*, No. 09-5949 (filed Aug. 14, 2009); *London* v. *United States*, No. 09-5844 (filed Aug. 11, 2009); *Lee* v. *United States*, No. 09-5248 (filed July 9, 2009); *McSwain* v. *United States*, No. 08-9560 (filed Mar. 26, 2009).

mons, 343 F.3d 72, 80 (2d Cir. 2003); *United States* v. *Sofsky*, 287 F.3d 122, 125 (2d Cir. 2002). Whatever the merit of those cases, because the Second Circuit decided this case under a de novo standard in light of the government's concession, the case comes to this Court on de novo review. Cf. *United States* v. *Gaudin*, 515 U.S. 506 (1995) (deciding issue de novo where government did not assert plain error in seeking a writ of certiorari).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 07-2436-cr

UNITED STATES OF AMERICA, APPELLEE

v.

LEON WILLIAMS, DEFENDANT-APPELLANT

[Decided: Mar. 5, 2009]

Before: POOLER and HALL, Circuit Judges, and TRAGER, District Judge.**

POOLER, Circuit Judge:

Leon Williams appeals from a June 1, 2007, judgment of conviction and sentence of the United States District Court for the Southern District of New York (Sand, J.). Williams was convicted of a drug trafficking crime which carried a ten-year mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(A), and possession of a firearm in furtherance of that drug trafficking crime, an offense which carried a five-year mandatory minimum consecutive sentence "[e]xcept to the extent that a greater minimum sentence is otherwise provided by . . . any other provision of law" under 18 U.S.C. § 924(c)(1)(A)(i). In this opinion, we address whether the district court erred

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** We thank amicus counsel for the helpful brief and oral argument in this appeal.

in imposing the five-year mandatory minimum consecutive sentence under Section 924(c)(1)(A)(i) even though a greater minimum sentence was provided for the predicate drug trafficking crime. In *United States v. Whitley*, 529 F.3d 150 (2d Cir. 2008), *reh'g denied*, 540 F.3d 87 (2d Cir. 2008), we held that the mandatory minimum sentence under Section 924(c)(1)(A) was inapplicable where the defendant was subject to a longer mandatory minimum sentence for a career criminal firearm possession violation. We now hold that the mandatory minimum sentence under Section 924(c)(1)(A) is also inapplicable where the defendant is subject to a longer mandatory minimum sentence for a drug trafficking offense that is part of the same criminal transaction or set of operative facts as the firearm offense.

We therefore affirm the district court's judgment of conviction and remand to give the district court the opportunity to resentence Williams consistent with our holding that Williams is not subject to the mandatory five-year minimum under Section 924(c)(1)(A). We also conclude that remand is required pursuant to *United States v. Regalado*, 518 F.3d 143 (2d Cir. 2008). We reject Williams's other challenges to his conviction and sentence on appeal.

BACKGROUND

At trial, the government presented evidence that on the evening of February 27, 2006, two New York City Police Department officers on patrol saw Williams standing next to a parked car on the side of the road, urinating. As the officers approached, they saw that inside the car were multiple cellular phones, wads of cash wrapped in rubber bands, and a plastic bag contain-

ing white residue, later determined to be narcotics. One of the officers also noticed a strange odor which he associated with narcotics. Later that evening, an inventory search of the car revealed a hidden compartment containing a loaded gun, a gun magazine, bullets, and 180 small bags of powder and crack cocaine. Williams's fingerprints were on the gun magazine. At trial, Williams admitted that he had been driving the car, which was registered to his sister, and that the cellular phones and cash, which totaled $1,100, were his.

The jury found Williams guilty of three counts: (1) possessing a firearm after being convicted of a felony, in violation of 18 U.S.C. § 922(g);[1] (2) possessing with intent to distribute over 50 grams of crack cocaine, in violation of 21 U.S.C. §§ 812, 841(a) & 841(b)(1)(A); and (3) possessing a firearm in furtherance of the drug trafficking crime charged in count two, in violation of 18 U.S.C. § 924(c)(1)(A)(i). Williams was sentenced principally to 130 months' imprisonment on count one (felon-in-possession), to run concurrently with a sentence of 135 months' imprisonment on count two (drug trafficking), and an additional consecutive five years' (60 months') imprisonment on count three (possession of a firearm in furtherance of drug trafficking), for a total of 195 months' imprisonment.

The felon-in-possession conviction carried no mandatory minimum sentence. 18 U.S.C. § 922(g). But the drug trafficking conviction carried a mandatory minimum penalty of ten years under 21 U.S.C. § 841(b)(1)(A). Because Section 841(b)(1)(A) is "any other provision of law" that "otherwise provide[s]" "a

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[1] Williams had previously been convicted of a felony on May 29, 1997 in New York state court.

greater minimum sentence," 18 U.S.C. § 924(c)(1)(A), Williams argues that the five-year minimum for possession of a firearm under Section 924(c)(1)(A)(i) does not apply. Williams also raises various other challenges to his conviction and sentence.

DISCUSSION

I. Section 924(c)

A. *United States v. Whitley*

Section 924(c) provides graduated penalties for various types of firearm use. In *United States v. Whitley*, 529 F.3d 150 (2d Cir. 2008), *reh'g denied*, 540 F.3d 87 (2d Cir. 2008), we interpreted the introductory "except" clause of Section 924(c)(1)(A).[2] That subsection provides, in pertinent part:

> *Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law*, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

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[2] Although Williams did not raise this argument below, if his reading of *Whitley* and the "except" clause are correct, the plain error standard of review would be met. *See Whitley*, 529 F.3d at 152 n. 1.

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(c)(1)(A) (emphasis added).

In *Whitley*, the defendant was convicted of three offenses all stemming from the same armed robbery: (1) a Hobbs Act violation, with no mandatory minimum penalty, *see* 18 U.S.C. § 1951; (2) an Armed Career Criminal Act ("ACCA") offense for possession of a firearm after conviction of three prior offenses, for which the minimum penalty was fifteen years, *see* 18 U.S.C. §§ 922(g)(1), 924(e); and (3) a Section 924(c) offense for discharging a firearm in relation to a crime of violence, for which the minimum penalty was a consecutive ten years, *see* 18 U.S.C. § 924(c)(1)(A)(iii). We concluded that the consecutive minimum ten-year penalty under Section 924(c) did not apply because a higher fifteen-year minimum was imposed by the ACCA. *Whitley*, 529 F.3d at 151.

In reaching this conclusion, we rejected the government's argument that the "except" clause relates solely to those firearms offenses specified in Section 924(c). *Id.* at 153. We held that the "except" clause of Section 924(c) "means what it literally says"—that the minimum sentences it requires do not apply where "'a greater minimum sentence is otherwise provided by . . . *any other provision of* law.'" *Id.* (quoting 18 U.S.C. § 924(c)(1)(A)) (emphasis added). "Any other provision of law" includes the ACCA. We rejected the govern-

ment's arguments that this literal interpretation of the "except" clause is "unsupported by the text, design, or the purpose of the statute, would produce illogical and distorted outcomes that Congress clearly did not intend, and has been rejected by other circuits." *Id.* at 155 (citations and quotation marks omitted). We observed that, "other than the decisions that have rewritten the 'except' clause in different ways to escape its plain meaning, we are aware of no decision rejecting the literal meaning of statutory language to the detriment of a criminal defendant." *Id.* at 156; *see also Whitley*, 540 F.3d at 88.

We are, of course, "bound by our own precedent unless and until its rationale is overruled, implicitly or expressly, by the Supreme Court or this court *en banc*." *Nicholas v. Goord*, 430 F.3d 652, 659 (2d Cir. 2005) (quotation marks omitted). We must therefore determine whether the question of statutory interpretation in this case is materially different from the question addressed by *Whitley*. There are two potentially relevant differences—(1) in *Whitley*, the longer mandatory minimum sentence was provided by the ACCA for *firearms*-related conduct, while in this case, it is provided by a non-firearms offense,[3] and (2) in *Whitley*, the long

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[3] We noted in *Whitley* "that the Fifth and Eighth Circuits have interpreted the 'except' clause to have a firearms limitation," 529 F.3d at 155-56 (citing *United States v. Collins*, 205 F. App'x 196, 198 (5th Cir. 2006); *United States v. Alaniz*, 235 F.3d 386, 389 (8th Cir. 2000)), and that the Sixth Circuit has cited these cases with approval, *see id.* (citing *United States v. Jolivette*, 257 F.3d 581, 587 (6th Cir. 2001)). We distinguished *Alaniz* and *Collins* by pointing out that the defendants in those cases, like Williams, were convicted of narcotics offenses, while Whitley was convicted of a firearms offense. *Id.* at 157. But we did not

er mandatory minimum sentence under the ACCA was to run *consecutively* with the sentence on the predicate offense, while in this case, the longer mandatory minimum sentence is supplied by that predicate offense. The government now argues that *Whitley* should be limited to its facts-that is, to instances in which a defendant faces two consecutive mandatory minimum sentences for firearm-related conduct resulting from the use of a single gun. The government again argues that its interpretation is required by the statutory text and structure, the legislative history, and to avoid illogical applications of the statute. We conclude that to accept the government's position would contravene the reasoning and result of *Whitley*.

B. Statutory Text

"[S]tatutory analysis necessarily begins with the plain meaning of a law's text and, absent ambiguity, will generally end there." *Puello v. BCIS*, 511 F.3d 324, 327 (2d Cir. 2007) (quotation marks omitted); *see also Whitley*, 529 F.3d at 156. The government argues that the clause "[e]xcept to the extent that a greater minimum sentence is otherwise provided by . . . any other provision of law," is ambiguous because it only directs a court where to look for the greater minimum ("any other provision of law"), and does not specify the offense to which the greater minimum sentence may apply. *See* 18 U.S.C. § 924(c)(1)(A). The government urges that we adopt the First Circuit's conclusion that the "except" clause is ambiguous because it "does not say 'a greater minimum sentence' *for what*; yet it has to have *some* understood

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comment on whether the Fifth and Eighth Circuits correctly read a firearms limitation into the "except" clause.

referent to be intelligible." *United States v. Parker*, 549 F.3d 5, 11 (1st Cir. 2008). The First Circuit rejected the possibilities that the referent could be "any other crime related to this case" or "the underlying drug crime or crime of violence," and held that the "more sensible[ ] referent" is "an additional minimum sentence for an underlying offense *because* of the presence of the firearm." *Id.* The First Circuit reasoned that *Whitley* was distinguishable because the "danger" in *Whitley* was the possibility of double-counting-two mandatory minimum consecutive firearms sentences could have applied for crimes involving the "*same gun.*" *Id.* In *Parker*, as here, the higher mandatory minimum sentence was supplied by a drug crime. *Id.*

But this double-counting distinction finds no support in *Whitley*. We held in *Whitley* that the "except" clause is not ambiguous—it "means what it literally says." 529 F.3d at 158. In *Whitley*, we rejected the "judicial insertion" of the words "consecutive" and "firearm" into the "except" clause. *Id.* at 153, 157-58. We noted that the Supreme Court had recently "condemn[ed] the insertion of words into a statute as 'not faithful to the statutory text,' " in *United States v. Rodriquez*, in which it "rejected the defendant's argument that 'reads [section 924(e)] as referring to 'the maximum term of imprisonment prescribed by law' for a defendant *with no prior convictions that trigger a recidivist enhancement*,' because 'that is not what [section 924(e)] says.'" 529 F.3d at 157 n. 5 (quoting *United States v. Rodriquez*, ___ U.S. ___, 128 S. Ct. 1783, 1788-89, 170 L. Ed. 2d 719 (2008) (emphasis in original)).

We are not persuaded that the phrase "any other provision of law" is insusceptible to a plain reading.

There is a discrete set of statutory offenses which require mandatory minimum sentences-mostly for narcotics and firearm crimes, but also for murder and other dangerous weapons. *See, e.g.*, 18 U.S.C. § 175c (biological weapons); *id.* § 924 (firearms); id. § 929 (restricted ammunition); *id.* § 1111 (murder); *id.* § 2332g (missile systems); *id.* § 2332h (radiological dispersal devices); 21 U.S.C. §§ 841, 844, 860, 960 (drugs). It is plausible to understand the reference to "any other provision of law" to include this limited set of crimes for which mandatory minimum sentences apply. As amicus counsel point out, there is no indication in the statutory language that Congress intended to be more lenient to defendants with multiple convictions for firearms-related conduct than to defendants convicted of drug trafficking crimes or other violent offenses, or that it intended to draw any distinction among offenses subject to minimum sentences. Amicus Br. at 10.

The statutory scheme supports this literal reading. Section 924 is the "Penalties" section of Chapter 44, "Firearms," of Title 18 of the United States Code. If Congress had intended the "except" clause to refer only to punishments for firearms offenses, it could simply have drafted that clause to read: "except to the extent that a greater minimum sentence is otherwise provided by this *section*." Instead, Congress chose the more expansive phrase, "this *subsection* [Section 924(a)] or *any other provision of law*." 18 U.S.C. 924(c)(1)(A) (emphasis added).

In holding that the "except" clause includes sentences for predicate offenses, we do not hold that the "except" clause is unbounded. The clause carves out an exception to the general rule that "any person who, dur-

ing and in relation to any crime of violence or drug trafficking crime . . . [and] in furtherance of any such crime, possesses a firearm," shall face an additional mandatory consecutive term of imprisonment. 18 U.S.C. § 924(c)(1). Thus, it is natural to read "any other provision of law" to include the penalty for the "crime of violence or drug trafficking crime," so long as the firearm was possessed "during and in relation to" or "in furtherance of" that predicate offense. *Id.* In other words, the "except" clause includes minimum sentences for predicate statutory offenses arising from the same criminal transaction or operative set of facts. An interpretation of "any other provision of law," to include, for example, provisions under which a defendant was already sentenced for a prior unrelated crime in a previous case, would be suspect. In this case, it is undisputed that the firearm possession that subjected Williams to the penalty under Section 924(c) arose from the same criminal transaction as the drug trafficking offense.[4]

The government asserts that other provisions of the statute support its structural argument that Congress intended that courts impose a consecutive, or nonconcurrent, sentence for a Section 924(c) offense without regard to the sentence imposed for the underlying predicate offense. Specifically, the statute states that (1) the graduated penalties set forth in Sections 924(c)(1)(A)(i)(iii) must be applied "*in addition to* the punishment provided for such crime of violence or drug trafficking crime," 18 U.S.C. § 924(c)(1)(A) (emphasis

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[4] We do not adopt an interpretation of the statute that would limit the scope of the "except" clause to crimes within the same charging instrument. Such an interpretation would elevate the form of the indictment or information over the substance of the offenses.

added); *see Parker*, 549 F.3d at 11 (concluding that this language renders the literal reading of the "except" clause "suspect on its face"); and (2) "*[n]otwithstanding any other provision of law* . . . no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including *any term of imprisonment imposed for the crime of violence or drug trafficking crime* during which the firearm was used, carried, or possessed," 18 U.S.C. § 924(c)(1)(D)(ii) (emphases added). The government points to this Court's recent decision in *United States v. Chavez*, which relied on this language to conclude that Section 924(c) "was plainly designed to impose penalties that are cumulative to the penalties imposed for other crimes." 549 F.3d 119, 134 (2d Cir. 2008).

To be sure, the general rule of Section 924(c) is that its penalties are cumulative. But the "except" clause is an *exception* to that rule. The government would have the rule swallow the exception. In *Whitley*, we rejected the argument that Section 924(c)(1)(D)(ii)'s prohibition on concurrent punishments would be displaced by a literal interpretation of the "except" clause.[5] If the "except" clause is read literally, and another statute provides a higher minimum penalty, the minimum punishments set forth in the subdivisions of Section

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[5] The other statutory language cited by the government, which provides that the mandatory minimum sentence for the firearm is to be in addition to any penalty for the predicate "crime of violence or drug trafficking crime," was not at issue in *Whitley* because there, the higher mandatory minimum sentence was provided by the ACCA offense, which was not the predicate "crime of violence or drug trafficking crime" for purposes of the Section 924(c) count. Nonetheless, the same logic of exception applies.

924(c)(1)(A) would never be imposed at all, and thus, there would be no concurrent sentences. *See Whitley*, 529 F.3d at 158.

The government also urges this Court to adopt the Fourth Circuit's reasoning that the statute's reference to "any other provision of law" is a "safety valve" that "simply reserv[es] the possibility that another statute or provision might impose a greater minimum consecutive sentencing scheme for a 924(c) violation, and [does not] negat[e] the possibility of consecutive sentencing in the circumstances" in which the defendant faces a greater mandatory minimum sentence for a predicate drug-trafficking or crime-of-violence offense. *United States v. Studifin*, 240 F.3d 415, 423 (4th Cir. 2001).[6] The Fourth Circuit based its conclusion on *United States v. Alaniz*, 235 F.3d 386, 389 (8th Cir. 2000), in which the Eighth Circuit held that the "except" clause was added just to make the statute grammatically correct. We rejected that precise line of reasoning in *Whitley*, because we failed to see any grammatical problem with the statute absent the "except" clause, and because the argument could not explain why the statute includes "the broad phrase 'or by any other provision of law.'" 529 F.3d at 154.

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[6] *Studifin* did not give any example of a statutory provision currently on the books that could increase a sentence for a violation of Section 924(c) but is not codified within that section. This argument must be that the "except" clause allows a greater minimum sentence in the event that Congress one day enacts higher mandatory minimum sentences for Section 924(c) violations in some other section of the Code.

C. Legislative History

The government urges that we turn to the legislative history to fill in the purported gap in the statutory language. "Only if we discern ambiguity do we resort first to canons of statutory construction, and, if the meaning remains ambiguous, to legislative history." *Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 423 (2d Cir. 2005) (citations omitted). Although we do not find the statutory terms to be ambiguous, were we to conclude that there was ambiguity, we would follow the Supreme Court's directive to "interpret ambiguous criminal statutes in favor of defendants, not prosecutors," rather than attempt to "play the part of a mind reader" divining "Congress's presumptive intent." *United States v. Santos*, ___U.S. ___, 128 S. Ct. 2020, 2026, 2028, 170 L. Ed. 2d 912 (2008). *See also United States v. Granderson*, 511 U.S. 39, 53-54, 114 S. Ct. 1259, 127 L. Ed. 2d 611 (1994) (courts must resolve ambiguities in favor of criminal defendants); *Crandon v. United States*, 494 U.S. 152, 160, 110 S. Ct. 997, 108 L. Ed. 2d 132 (1990) (when construing a criminal statute, courts are "guided by the need for fair warning"); *McNally v. United States*, 483 U.S. 350, 359-60, 107 S. Ct. 2875, 97 L. Ed. 2d 292 (1987) (when confronted with "two rational readings of a criminal statute, one harsher than the other, [courts] are to choose the harsher only when Congress has spoken in clear and definite language"), *superseded by statute*, 18 U.S.C. § 1346, *as recognized by United States v. Rybicki*, 354 F.3d 124, 134 (2d Cir. 2003) (en banc).

The government argues that if Williams had been sentenced before the "except" clause was added to the statute in 1998, he would have faced both consecutive

mandatory minimum sentences, and because the sponsors of the legislation stated that their general intent was to enhance penalties, Congress could not have intended an interpretation of the statute that would subject a defendant like Williams to only one mandatory minimum sentence. The *Whitley* court ruled that the government's argument that the congressional purpose behind Section 924(c) was to increase sentences was insufficient to void the plain language of the statute. 529 F.3d at 154-55. Although Congress might have intended to enhance firearm penalties, it was not "inconsistent with that purpose for Congress to have provided a series of increased minimum sentences and also to have made a reasoned judgment that where a defendant is exposed to two minimum sentences, some of which were increased by the 1998 amended version, only the higher minimum should apply. Indeed, such a sentencing pattern seems eminently sound." *Id.* at 155.[7] There is no reason to depart from *Whitley*'s reasoning in Williams's case.[8]

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[7] The government cites one specific statement from the legislative history that might bear on the statutory interpretation question at issue here-a statement that the bill had the "salutary aspect" of "authorizing imposition of stiffer minimum sentences if required under other provisions of law," thus "eliminat[ing] any potential inconsistency with other statutes." Gov't Supp. Br. at 17 (quoting *Criminal Use Of Guns: Hearing on S. 191, A Bill To Throttle Criminal Use Of Guns,* Hearing Before The Committee On The Judiciary, United States Senate, 105th Cong. at 38 (May 8, 1997) (Statement of Thomas Hungar, formerly of the Office of the Solicitor General)). To the extent that this vague statement is consistent with the statutory text, it does not compel the government's interpretation of the "except" clause, because it begs the question of the meaning of "potential inconsistency."

[8] The government also argues that congressional acquiescence in decisions by other Circuits affirming the imposition of the mandatory pen-

D. Anomalous Sentencing Results

A departure from the plain text of a statute is warranted only in the rare case where the anomalous result rises to the level of a "patent absurdity," *see Hubbard v. United States*, 514 U.S. 695, 703, 115 S. Ct. 1754, 131 L. Ed. 2d 779 (1995) (quotation marks omitted), or has "no basis in reason," *see Whitley*, 540 F.3d at 89 (quotation marks omitted). *See also Clinton v. City of New York*, 524 U.S. 417, 429, 118 S. Ct. 2091, 141 L. Ed. 2d 393 (1998) (applying absurdity doctrine where there was "no plausible reason" supporting a limited plain text reading).

The government argues that Williams's construction of the "except" clause results in illogical distortions of Section 924(c). It provides the example of a defendant who possessed 500 grams of cocaine, subjecting him to a five-year minimum sentence under 21 U.S.C. § 841(b)(1)(B), and brandished a firearm in furtherance of that offense, subjecting him to a consecutive seven-year minimum sentence, resulting in a mandatory minimum sentence of twelve years. But if that defendant had possessed five kilograms of cocaine—ten times more—he would be subjected only to the ten-year minimum sentence under 21 U.S.C. § 841(b)(1)(A). The low-

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alties under Section 924(c), even where greater minimum sentences apply for drug trafficking, supports its interpretation of the statute. But it is an impermissible stretch to draw any such inference in this case, due to the relatively small number of inconsistent holdings on the issue. *Cf. Evans v. United States*, 504 U.S. 255, 268-69 n. 22, 112 S. Ct. 1881, 119 L. Ed.2d 57 (1992) (inferring congressional agreement with prevailing and consistent interpretation of statute by at least nine appellate courts over 20 years in high-profile cases involving prosecutions of important officials, for example, the Governor of Oklahoma).

er seven-year minimum for brandishing the firearm would not apply. Thus, a defendant could be subjected to a lower total mandatory minimum sentence for a more severe crime.[9]

Whitley made note of this apparent anomaly. 529 F.3d at 156. If *Whitley*'s holding was limited to its facts, and the term "any other provision of law" meant only ACCA offenses, no anomalies would result. This is because the alternative mandatory minimum sentence under the ACCA is fifteen years, a number that would consistently trump the five- to ten-year minimums under Section 924(c)(1)(A)(i)-(iii). *See Whitley*, 529 F.3d at 157-58 (rejecting the Fourth Circuit's analysis in *Studifin* that an anomaly would result from imposing ACCA's minimum sentence in lieu of any higher sentence under Section 924(c)).

However, *Whitley* did not rely on reading an ACCA limitation into the "except" clause to reject the point regarding the potential anomaly. *Whitley*'s primary reasoning is that the anomaly "disappears upon close scrutiny" because "no court would be *required* to sentence the five-kilogram defendant to only the ten-year minimum. That defendant would face a maximum sentence of life. . . . If the 'except' clause subjected more serious drug offenders to a lower *maximum* sentence

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[9] The government's brief provides two additional examples that are not anomalies per se, but rather are examples of how Williams's interpretation would result in *disparities* between the minimum sentences that would apply to less and more severe conduct-for example, a ten year minimum for possessing drugs and *brandishing* a gun, but a twenty year minimum for possessing drugs and *discharging* a gun. Similar disparities result directly from *Whitley*'s holding with respect to firearms sentences, and do not render the literal reading of the statute absurd.

than less serious drug offenders, the Government's anomaly argument would have some force." 529 F.3d at 155. Thus, a literal reading of the statute does not render it incoherent. As this Court reinforced in its decision denying the petition for rehearing: "[t]he literal wording leaves no defendant unsentenced. Indeed, . . . it leaves sentencing judges free to impose precisely the same number of years that the Government contends should have been imposed on Whitley, but authorizes them to do so as a matter of discretion, not as a requirement." *Whitley*, 540 F.3d at 89.[10]

In any event, this purported anomaly results from what, in our view, is a plain reading of the statutory text. "If, at the end of the day, Congress believes we have erred in interpreting [the statute], it remains free to correct our mistake." *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 246, 115 S. Ct. 817, 130 L. Ed. 2d 715 (1995) (O'Connor, J., concurring in part and dissenting in part); *see also Clark v. Martinez*, 543 U.S. 371, 386, 125 S. Ct. 716, 160 L. Ed. 2d 734 (2005).

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[10] Moreover, as amicus counsel argues, the United States Sentencing Guidelines themselves resolve the specific anomaly highlighted by the government. Under the Guidelines, the low end of the sentencing range for a defendant convicted of possession of five kilograms of cocaine, assuming no criminal history, would be twelve years and seven months, which is longer than the twelve-year minimum applicable to a defendant in possession of only 500 grams of cocaine. The government's response is that the Guidelines would not help a judge who seeks to sentence both defendants to the lowest possible sentence allowed by the statute. But the hypothetical judge could increase the sentence of the defendant who was not subjected to double mandatory minimum sentences to achieve parity.

II. Williams's Challenges to his Conviction

Williams challenges the sufficiency of the evidence underlying his conviction, arguing that there was no evidence demonstrating that he knowingly possessed the crack cocaine and firearm that were recovered from the vehicle. In reviewing the sufficiency of the evidence, we must "view the evidence presented in the light most favorable to the government, and . . . draw all reasonable inferences in its favor." *United States v. Autuori*, 212 F.3d 105, 114 (2d Cir. 2000). The verdict must be sustained if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). The evidence presented at trial was sufficient to permit a rational juror to conclude beyond a reasonable doubt that: Williams possessed the firearm (his fingerprints were on the gun magazine;[11] it was in the car he was driving); Williams possessed the crack cocaine with an intent to distribute (the car had a narcotics odor; the drugs were in the same compartment as the firearm; there were 180 small bags containing over 150 grams of cocaine; he had $1,100 and six cellular phones in the car); and that the gun was used in connection with the firearms offense (the gun and the drugs were found in the same hidden compart-

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[11] Williams testified at trial that his fingerprints appeared on the gun magazine because police officers had handed him the gun magazine at the precinct. In rebuttal, two police officers testified that Williams did not touch the weapons at the precinct. The jury certainly could have inferred from the officers's testimony that Williams's fingerprints were on the gun magazine before the arrest and, indeed, that Williams testified falsely in order to conceal his knowledge of what was in the car's hidden compartment.

ment). Thus, we reject Williams's challenge to the sufficiency of the evidence.

Williams also argues that his trial counsel was ineffective for stipulating to the fact that the gun and drugs were found during an inventory search of the car following his arrest. Williams argues that this stipulation was inconsistent with the alleged theory of the defense: to wit, that Williams was framed by the police. We decline to deviate from our "baseline aversion to resolving ineffectiveness claims on direct review" in this case, because the factual record on the issue is not fully developed and resolution of the issue is not beyond doubt. *See United States v. Khedr*, 343 F.3d 96, 99-100 (2d Cir. 2003) (quotation marks omitted). Williams's ineffectiveness claim can be better developed in the district court on a motion under 28 U.S.C. § 2255. *Id.* at 100.

III. Remand for Resentencing

Williams also challenges the constitutionality of the crack-to-powder cocaine sentencing ratio, which was integral to the calculation of his base offense levels and sentencing range on the narcotics count under the United States Sentencing Guidelines. The government concedes that the record does not establish whether the district court was cognizant of its ability to impose a non-Guidelines sentence based on the disparity between sentencing for crack and powder cocaine offenses, and that therefore, remand is appropriate pursuant to *United States v. Regalado*, 518 F.3d 143, 149 (2d Cir. 2008).

Therefore, we remand for resentencing pursuant to *Regalado* and consistent with our holding that Williams is not subject to the mandatory consecutive five-year minimum for the firearm conviction under Section

924(c). Upon resentencing, Williams remains subject to the ten-year minimum statutory sentence for his drug trafficking crime, "and the sentencing judge retains authority to select any appropriate sentence, consistent with 18 U.S.C. § 3553(a), whether or not pursuant to the Guidelines, above that minimum." *Whitley*, 529 F.3d at 158 (footnote omitted). In light of our decision to remand, we reject, as premature, Williams's challenge to the substantive reasonability of his sentence.

CONCLUSION

For the foregoing reasons, we affirm Williams's conviction and remand to the district court for resentencing.

UNITED STATES DISTRICT COURT

SOUTHERN District of NEW YORK

UNITED STATES OF AMERICA
V.
LEON WILLIAMS

JUDGMENT IN A CRIMINAL CASE

Case Number: 06Cr.00319-01(LBS)

USM Number: 052-62-8941

B. Alan Seidler, Esq.
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

X was found guilty on count(s) 1,2 and 3
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
T-18 USC § 922(g)(1)	Felon in possession of a Firearm	02/27/2006	1
T-21 USC § 812,841(a) and 841(b)(1)(A))	Distribution and possession with intent to distribute cocaine base	02/27/2006	2
T-18 USC §924(c)(1)(A))	Possession of a firearm in furtherance of a Narcotics Conspiracy	02/27/2006	3

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #: _____
DATE FILED: 5-31-07

MAY 29, 2007
Date of Imposition of Judgment

Signature of Judge

HON. LEONARD B. SAND U.S. D. J.
Name and Title of Judge

5/31/07
Date

A TRUE COPY
J. MICHAEL McMAHON, CLERK

BY _____
DEPUTY CLERK

DEFENDANT: LEON WILLIAMS
CASE NUMBER: 06Cr.00319-01(LBS)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: ONE HUNDRED and TWENTY(120) Months on count 1 and ONE HUNDRED and THIRTY FIVE(135) MONTHS on count 2 to run concurrently with each other followed by a consecutive SIXTY(60) month term on count 3. Total sentence :(195) months.
Defendant notified of right to appeal sentence and conviction.

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X The court makes the following recommendations to the Bureau of Prisons:
to a facility most proximate to home and family in the N.Y. Metropolitan area.

X The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: LEON WILLIAMS
CASE NUMBER: 06Cr.00319-01(LBS)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: Three (3) years on count 1 and Five(5) years on counts 2 and 3. All counts to run concurrently.

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The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

X The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

X The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: LEON WILLIAMS
CASE NUMBER: 06Cr.00319-01(LBS)

SPECIAL CONDITIONS OF SUPERVISION

1) The defendant shall submit his person, residence, place of business, vehicle, or other premises under his control to a search on the basis that the probation officer has reasonable belief that contraband or evidence of a violations of the conditions of the release may be found. The search must be conducted at a reasonable time and in a reasonable manner. Failure to submit to a search may be grounds for revocation. The defendant shall inform any other residents that the premises may be subject to a search pursuant to this condition.

DEFENDANT: LEON WILLIAMS
CASE NUMBER: 06Cr.00319-01(LBS)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 300.00	$	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS	$ _____$0.00	$ _____$0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: LEON WILLIAMS
CASE NUMBER: 06Cr.00319-01(LBS)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A X Lump sum payment of $ 300.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

DEFENDANT: LEON WILLIAMS
CASE NUMBER: 06Cr.00319-01(LBS)
DISTRICT: S.D.N.Y

STATEMENT OF REASONS
(Not for Public Disclosure)

I COURT FINDINGS ON PRESENTENCE INVESTIGATION REPORT

A [X] **The court adopts the presentence investigation report without change.**

B [ ] **The court adopts the presentence investigation report with the following changes.**
(Check all that apply and specify court determination, findings, or comments, referencing paragraph numbers in the presentence report, if applicable.)
(Use page 4 if necessary.)

1 [ ] **Chapter Two of the U.S.S.G. Manual** determinations by court (including changes to base offense level, or specific offense characteristics):

2 [ ] **Chapter Three of the U.S.S.G. Manual** determinations by court (including changes to victim-related adjustments, role in the offense, obstruction of justice, multiple counts, or acceptance of responsibility):

3 [ ] **Chapter Four of the U.S.S.G. Manual** determinations by court (including changes to criminal history category or scores, career offender, or criminal livelihood determinations):

4 [ ] **Additional Comments or Findings** (including comments or factual findings concerning certain information in the presentence report that the Federal Bureau of Prisons may rely on when it makes inmate classification, designation, or programming decisions):

C [ ] **The record establishes no need for a presentence investigation report pursuant to Fed.R.Crim.P. 32.**

II COURT FINDING ON MANDATORY MINIMUM SENTENCE (Check all that apply.)

A [ ] No count of conviction carries a mandatory minimum sentence

B [ ] Mandatory minimum sentence imposed

C [ ] One or more counts of conviction alleged in the indictment carry a mandatory minimum term of imprisonment, but the sentence imposed is below a mandatory minimum term because the court has determined that the mandatory minimum does not apply based on

- [ ] findings of fact in this case
- [ ] substantial assistance (18 U.S.C. § 3553(e))
- [ ] the statutory safety valve (18 U.S.C. § 3553(f))

III COURT DETERMINATION OF ADVISORY GUIDELINE RANGE (BEFORE DEPARTURES):

Total Offense Level: 32
Criminal History Category: II
Imprisonment Range: 135 to 168 months
Supervised Release Range: 3 to 5 years
Fine Range: $ 17,500 to $ 4,000,000

X Fine waived or below the guideline range because of inability to pay.

DEFENDANT: LEON WILLIAMS
CASE NUMBER: 06Cr.00319-01(LBS)
DISTRICT: S.D.N.Y.

STATEMENT OF REASONS

(Not for Public Disclosure)

IV ADVISORY GUIDELINE SENTENCING DETERMINATION (Check only one.)

A ☐ The sentence is within an advisory guideline range that is not greater than 24 months, and the court finds no reason to depart.

B ☒ The sentence is within an advisory guideline range that is greater than 24 months, and the specific sentence is imposed for these reasons. (Use page 4 if necessary.)

C ☐ The court departs from the advisory guideline range for reasons authorized by the sentencing guidelines manual. (Also complete Section V.)

D ☐ The court imposed a sentence outside the advisory sentencing guideline system. (Also complete Section VI.)

V DEPARTURES AUTHORIZED BY THE ADVISORY SENTENCING GUIDELINES (If applicable.)

A **The sentence imposed departs** (Check only one.):
- ☐ below the advisory guideline range
- ☐ above the advisory guideline range

B Departure based on (Check all that apply.):

1 **Plea Agreement** (Check all that apply and check reason(s) below.):
- ☐ 5K1.1 plea agreement based on the defendant's substantial assistance
- ☐ 5K3.1 plea agreement based on Early Disposition or "Fast-track" Program
- ☐ binding plea agreement for departure accepted by the court
- ☐ plea agreement for departure, which the court finds to be reasonable
- ☐ plea agreement that states that the government will not oppose a defense departure motion.

2 **Motion Not Addressed in a Plea Agreement** (Check all that apply and check reason(s) below.):
- ☐ 5K1.1 government motion based on the defendant's substantial assistance
- ☐ 5K3.1 government motion based on Early Disposition or "Fast-track" program
- ☐ government motion for departure
- ☐ defense motion for departure to which the government did not object
- ☐ defense motion for departure to which the government objected

3 **Other**
- ☐ Other than a plea agreement or motion by the parties for departure (Check reason(s) below.):

C **Reason(s) for Departure** (Check all that apply other than 5K1.1 or 5K3.1.)

☐ 4A1.3	Criminal History Inadequacy	☐ 5K2.1	Death	☐ 5K2.11	Lesser Harm
☐ 5H1.1	Age	☐ 5K2.2	Physical Injury	☐ 5K2.12	Coercion and Duress
☐ 5H1.2	Education and Vocational Skills	☐ 5K2.3	Extreme Psychological Injury	☐ 5K2.13	Diminished Capacity
☐ 5H1.3	Mental and Emotional Condition	☐ 5K2.4	Abduction or Unlawful Restraint	☐ 5K2.14	Public Welfare
☐ 5H1.4	Physical Condition	☐ 5K2.5	Property Damage or Loss	☐ 5K2.16	Voluntary Disclosure of Offense
☐ 5H1.5	Employment Record	☐ 5K2.6	Weapon or Dangerous Weapon	☐ 5K2.17	High-Capacity, Semiautomatic Weapon
☐ 5H1.6	Family Ties and Responsibilities	☐ 5K2.7	Disruption of Government Function	☐ 5K2.18	Violent Street Gang
☐ 5H1.11	Military Record, Charitable Service, Good Works	☐ 5K2.8	Extreme Conduct	☐ 5K2.20	Aberrant Behavior
		☐ 5K2.9	Criminal Purpose	☐ 5K2.21	Dismissed and Uncharged Conduct
☐ 5K2.0	Aggravating or Mitigating Circumstances	☐ 5K2.10	Victim's Conduct	☐ 5K2.22	Age or Health of Sex Offenders
				☐ 5K2.23	Discharged Terms of Imprisonment
				☐	Other guideline basis (e.g., 2B1.1 commentary)

D **Explain the facts justifying the departure.** (Use page 4 if necessary.)

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DEFENDANT: LEON WILLIAMS
CASE NUMBER: 06Cr.00319-01(LBS)
DISTRICT: S.D.N.Y.

STATEMENT OF REASONS
(Not for Public Disclosure)

VI COURT DETERMINATION FOR SENTENCE OUTSIDE THE ADVISORY GUIDELINE SYSTEM
(Check all that apply.)

A **The sentence imposed is** (Check only one.):
- ☐ below the advisory guideline range
- ☐ above the advisory guideline range

B Sentence imposed pursuant to (Check all that apply.):

1 **Plea Agreement** (Check all that apply and check reason(s) below.):
- ☐ binding plea agreement for a sentence outside the advisory guideline system accepted by the court
- ☐ plea agreement for a sentence outside the advisory guideline system, which the court finds to be reasonable
- ☐ plea agreement that states that the government will not oppose a defense motion to the court to sentence outside the advisory guideline system

2 **Motion Not Addressed in a Plea Agreement** (Check all that apply and check reason(s) below.):
- ☐ government motion for a sentence outside of the advisory guideline system
- ☐ defense motion for a sentence outside of the advisory guideline system to which the government did not object
- ☐ defense motion for a sentence outside of the advisory guideline system to which the government objected

3 Other
- ☐ Other than a plea agreement or motion by the parties for a sentence outside of the advisory guideline system (Check reason(s) below.):

C **Reason(s) for Sentence Outside the Advisory Guideline System** (Check all that apply.)

- ☐ the nature and circumstances of the offense and the history and characteristics of the defendant pursuant to 18 U.S.C. § 3553(a)(1)
- ☐ to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense (18 U.S.C. § 3553(a)(2)(A))
- ☐ to afford adequate deterrence to criminal conduct (18 U.S.C. § 3553(a)(2)(B))
- ☐ to protect the public from further crimes of the defendant (18 U.S.C. § 3553(a)(2)(C))
- ☐ to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner (18 U.S.C. § 3553(a)(2)(D))
- ☐ to avoid unwarranted sentencing disparities among defendants (18 U.S.C. § 3553(a)(6))
- ☐ to provide restitution to any victims of the offense (18 U.S.C. § 3553(a)(7))

D **Explain the facts justifying a sentence outside the advisory guideline system.** (Use page 4 if necessary.)
Count 3-Mandatory minimum of sixty(60) months and consecutive to guideline range.

DEFENDANT: LEON WILLIAMS
CASE NUMBER: 06Cr.00319-01(LBS)
DISTRICT: S.D.N.Y.

STATEMENT OF REASONS
(Not for Public Disclosure)

VII COURT DETERMINATIONS OF RESTITUTION

A [X] Restitution Not Applicable.

B Total Amount of Restitution: _____

C Restitution not ordered (Check only one.):

1 [ ] For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because the number of identifiable victims is so large as to make restitution impracticable under 18 U.S.C. § 3663A(c)(3)(A).

2 [ ] For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because determining complex issues of fact and relating them to the cause or amount of the victims' losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim would be outweighed by the burden on the sentencing process under 18 U.S.C. § 3663A(c)(3)(B).

3 [ ] For other offenses for which restitution is authorized under 18 U.S.C. § 3663 and/or required by the sentencing guidelines, restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweigh the need to provide restitution to any victims under 18 U.S.C. § 3663(a)(1)(B)(ii).

4 [ ] Restitution is not ordered for other reasons. (Explain.)

D [ ] Partial restitution is ordered for these reasons (18 U.S.C. § 3553(c)):

VIII ADDITIONAL FACTS JUSTIFYING THE SENTENCE IN THIS CASE (If applicable.)

Sections I, II, III, IV, and VII of the Statement of Reasons form must be completed in all felony cases

Defendant's Soc. Sec. No.: 052-62-8941

Defendant's Date of Birth: August 9, 1972

Defendant's Residence Address: 2112 Starling Avenue, Apt. 2B
Bronx, New York 10467

Defendant's Mailing Address: 2112 Starling Avenue, Apt. 2B
Bronx, N.Y. 10467

Date of Imposition of Judgment:
MAY 29, 2007

Signature of Judge
HON. LEONARD B. SAND, U.S.D.J.

Name and Title of Judge

Date Signed _____

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Number: 07-2436-cr

UNITED STATES OF AMERICA, APPELLEE

v.

LEON WILLIAMS, DEFENDANT-APPELLANT

[Filed: June 22, 2009]

ORDER

Appellee United States of America having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

[SEAL OMITTED]

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: FRANK PEREZ
FRANK PEREZ, Deputy Clerk

APPENDIX D

18 U.S.C. 924(c) provides:

Penalties

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler,

the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section—

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition—

(i) if the killing is murder (as defined in Section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in Section 1112), be punished as provided in Section 1112.

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(4)

No. 09-466

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

LEON WILLIAMS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

18 U.S.C. § 924(c) specifies mandatory consecutive sentences for certain firearm offenses, "[e]xcept to the extent that a greater minimum sentence is otherwise provided under this subsection, or by *any* other provision of law" (emphasis added). Respondent was subject to a ten-year mandatory-minimum sentence for a drug-trafficking conviction under 21 U.S.C. §§ 841(a) & 841(b)(1)(A), as well as a five-year mandatory-minimum consecutive sentence for a § 924(c) violation unless the "except" clause applied. The Second Circuit held that because the § 924(c) charge "arose from the same criminal transaction as the drug trafficking offense," the "except" clause left the sentencing judge discretion in deciding whether to impose a sentence over and above the greater ten-year mandatory minimum. Pet. App. 10a, 19a-20a. The question presented is:

Must a sentencing judge impose a mandatory consecutive sentence under 18 U.S.C. § 924(c) if the defendant is also subject to a greater mandatory-minimum sentence under another provision of law for a drug-trafficking offense that arises from the same criminal transaction as the firearm offense?

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REASONS FOR DENYING THE PETITION

This Court has repeatedly held that 18 U.S.C. § 924(c) should be interpreted literally. Specifically, in interpreting the then-current version of § 924(c), this Court read the statute's words literally and broadly. *United States v. Gonzales*, 520 U.S. 1, 6 (1997). *Gonzales* read the word "any" in the statute as a "straightforward statutory command [that left open] no reason to resort to legislative history." *Id.* Likewise, in *Busic*, this Court hewed to the then-current text of § 924(c), refusing to rewrite it to avoid supposedly unintended or irrational results. *Busic v. United States*, 446 U.S. 398, 405 (1980).

In accord with *Gonzales*'s reasoning, the Second Circuit's decision below interpreted the words "any other provision of law" in the current version of the statute. Like *Gonzales*, it read "any" literally and broadly, holding "that the mandatory minimum sentence under Section 924(c)(1)(A) is . . . inapplicable where the defendant is subject to a longer mandatory sentence for a drug trafficking offense that is part of the same criminal transaction or set of operative facts as the firearm offense." Pet. App. 2a. Like *Gonzales*, the Second Circuit rejected the government's invitation to use legislative history to cloud the clear statute. *Id.* at 13a-14a. And like *Busic*, it rejected the government's request to rewrite the statute to avoid supposedly irrational or unintended results. *Id.* at 15a-17a. In other words,

§ 924(c)(1)(A)'s "except" clause "means what it literally says." *Id.* at 5a (internal quotation marks omitted). In seeking review of that holding, the government disregards *Gonzales*'s and *Busic*'s respect for the statute's text.

In short, the Second Circuit faithfully followed and applied this Court's approach in *Gonzales* and *Busic*. While a circuit split exists, it is undeveloped, immature, lopsided, and will present other vehicles for review. Thus, this Court should deny the petition for certiorari.

I. The Decision Below Is Correct

A. The Second Circuit Correctly Applied the Statute's Plain Meaning in Accordance with This Court's Precedents

1. The Second Circuit properly interpreted the plain meaning of the statute in holding that the otherwise-applicable mandatory-minimum sentence of § 924(c)(1)(A) did not apply to respondent Leon Williams.

Section 924(c)(1)(A) provides in full:

> *Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law*, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm,

> shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –
>
> > (i) be sentenced to a term of imprisonment of not less than 5 years;
> >
> > (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
> >
> > (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years

18 U.S.C. § 924(c)(1)(A) (emphasis added).

The question presented is how to interpret the phrase "any other provision of law." The government asks this Court to look beyond the plain language of the second half of the "except" clause. Mr. Williams was convicted of three offenses: "(1) possessing a firearm after being convicted of a felony, in violation of 18 U.S.C. § 922(g); (2) possessing with intent to distribute over 50 grams of crack cocaine, in violation of 21 U.S.C. §§ 812, 841(a) & 841(b)(1)(A); and (3) possessing a firearm in furtherance of the drug trafficking crime charged in count two, in violation of 18 U.S.C. § 924(c)(1)(A)(i)." Pet. App. 3a.

As the Second Circuit reasoned, "any other provision of law" naturally includes any crime "arising from the same criminal transaction or operative set of facts" as the § 924(c) charge. *Id.* at 10a. Because "the drug trafficking conviction carried a mandatory minimum penalty of ten years under 21 U.S.C. § 841(b)(1)(A)," the Second Circuit held that the conviction triggered the "except" clause.

Id. at 3a, 8a-9a. Thus, § 924(c)(1)(A)(i) did not mandate an additional consecutive five-year sentence for Mr. Williams. *Id.* at 8a-9a

The government, however, rejects this plain reading of the text. It asks this Court to look beyond the statute's plain language because the word "any" in "any other provision of law" cannot bear its natural, normal meaning. Instead, the government argues, the "understood referent" of the phrase "any other provision of law" is "set forth in the language that immediately follows: using, carrying, or possessing a firearm in connection with a crime of violence or a drug trafficking crime." Pet. 10. In other words, "any other provision of law" is limited to future statutes that would penalize the conduct described after the comma in § 924(c): "us[ing] or carr[ying or possessing] a firearm" "during and in relation to any crime of violence or drug trafficking crime." *Id.* at 12. In support of this argument, the government cites the statute's enactment history and "obvious purpose," offering no citation for that "obvious purpose." *Id.* at 14-15.

The government's argument, however, misses the force of the statute's command by making the second half of the "except" clause effectively meaningless. The "except" clause has two parts, one of which is triggered where there is "a greater minimum sentence . . . provided by this subsection [§ 924(c)(1)(A)]," and the other where that minimum sentence is provided "by any other provision of law." The

government's reading is the plain and natural reading of the first half of the "except" clause but renders the second half of the clause redundant of the first half. In order to avoid the redundancy, the government is forced to hypothesize that, at some point in the future, Congress might enact a criminal statute that would not be codified within § 924(c) but would nevertheless specify higher mandatory-minimum sentences for the precise crime already codified within § 924(c). Pet. 12. The government cannot point to a single criminal statute that fits within its reading of the second half of the "except" clause. By effectively reading the second phrase out of the "except" clause, the government fails to make every word in the statute count. As this Court has noted, "[i]n construing a statute we are obliged to give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979).

The government's reading, in short, renders the second half of the clause entirely redundant of the first half, requires hypothesizing possible future statutes that would render the phrase meaningless, and ignores the broad sweep of "any other provision of law." Because the statutory language is clear, it controls.

2. The government further objects that the Second Circuit's reading of the "except" clause nullifies 18 U.S.C. § 924(c)(1)(D), which provides that, "[n]otwithstanding any other provision of law . . . (ii) no

term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment for" the predicate violent or drug-trafficking crime. Pet. 15. But that subsection forbids only imposing another concurrent term of imprisonment. When the "except" clause applies, the sentencing court need not impose any separate term of imprisonment at all for the § 924(c) conviction. Pet. App. 11a-12a. The sentencing judge can thus easily comply with both the "except" and "notwithstanding" clauses. And when there is no higher mandatory-minimum sentence to trigger the "except" clause, the "notwithstanding" clause ensures that the § 924(c) sentence runs consecutively.

3. This Court has previously interpreted the word "any" in § 924(c) according to its plain, broad meaning. In *Gonzales*, this Court construed a previous version of § 924(c), which at the time provided:

> Whoever, during and in relation to any . . . drug trafficking crime . . . for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime . . . , be sentenced to imprisonment for five years . . . . Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with *any other term of imprisonment* including that imposed for the . . . drug trafficking crime in which the firearm was used or carried.

18 U.S.C. § 924(c) (1996) (emphasis added); *Gonzales*, 520 U.S. at 5. The question in *Gonzales* was whether a district court had discretion to order that a sentence under § 924(c) run concurrently with a sentence imposed by a state court. *Id.* at 2. In its analysis, however, this Court viewed the question presented as simply "whether the phrase 'any other term of imprisonment' means what it says, or whether it should be limited to some subset of prison sentences—namely, only federal sentences." *Id.* at 5 (second set of internal quotation marks and citation omitted).

Answering its own question, this Court held: "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Id.* (quoting *Webster's Third New International Dictionary* 97 (1976)). *Gonzales* underscored the importance of following the statute's plain meaning: "'[W]here there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a court in departing from the plain meaning of the words . . . .'" *Id.* at 8 (quoting *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95-96 (1820) (Marshall, C.J.)). Based on a common-sense understanding of "any," this Court concluded: "There is no basis in the text for limiting § 924(c) to federal sentences." *Id.* at 5. "Any" means "any."

The reasoning of *Gonzales* applies with equal force here. The Second Circuit, in the precedent on which the decision below rested, took to heart *Gonzales*'s instruction to read § 924(c) literally according to its plain meaning. *United States v. Whitley*, 529 F.3d 150, 156, *reh'g denied*, 540 F.3d 87 (2d Cir. 2008) (citing and following *Gonzales*). "Any" "should [not] be limited to some subset of" other crimes, *Gonzales*, 520 U.S. at 5, namely other crimes penalizing the precise conduct already penalized by the remainder of the subsection. "[T]he 'except' clause . . . means what it literally says," so § 924(c) does not mandate a consecutive penalty when *any* other crime specifies a higher mandatory minimum. *Whitley*, 529 F.3d at 153. (The government did not seek certiorari to review *Whitley*'s holding.) Since the Second Circuit properly construed the term "any" within the meaning of § 924(c), this Court need not intervene to do the same.

4. Similarly, this Court in *Busic* refused to rewrite § 924(c) to effectuate Congress's supposed intent or avoid supposed absurdities. In *Busic*, the government argued that prosecutors should be able to choose between seeking a § 924(c) firearm sentence or a separate firearm enhancement built into certain predicate felony statutes. 446 U.S. at 403. The government claimed that if Congress had focused on the question, it would have wanted to give prosecutors the option of charging either § 924(c) or the enhancement built into the predicate

felony. *Id.* at 404. It also argued that a contrary ruling would lead to irrational results. *Id.* This Court rejected these claims: "[T]o the extent that cases can be hypothesized in which this holding may support curious or seemingly unreasonable comparative sentences, . . . the asserted unreasonableness flows not from . . . this decision, but rather from the statutes as Congress wrote them. If corrective action is needed, it is the Congress that must provide it." *Id.* at 405.

B. The Second Circuit's Decision Is Reasonable and Accords with the Rule of Lenity

The government's primary argument against the statute's plain meaning is that the Second Circuit's reasoning would supposedly lead to absurd results. It contends, without citation, that Congress added the "except" clause as part of amendments designed "both to broaden Section 924(c) . . . and to stiffen the penalties." Pet. 14. (In the Second Circuit, the government relied on legislative history to establish the statute's supposed purpose, Pet. App. 13a-14a, even though *Gonzales* had rejected using legislative history to muddy § 924(c)'s clear text, 520 U.S. at 6.) The Second Circuit's reasoning, it suggests, is perverse because it "*eliminat[es]* the Section 924(c) penalties altogether" for the most serious crimes, turning it into a presumptive enhancement that can be displaced by larger enhancements. Pet. 15-16. Finally, the

government offers a hypothetical scenario in which one defendant who faces a ten-year minimum drug sentence would avoid a minimum § 924(c) sentence, while a defendant convicted of possessing a smaller quantity of drugs might face five years for the drug crime plus another seven years for brandishing the gun. *Id.* at 16-17.

The government's argument fails for three reasons. *First*, the "except" clause governs only minimums, not maximums; it prevents excessive floors but leaves in place high ceilings. Even where the "except" clause applies, district courts retain discretion to impose additional prison terms where appropriate, up to § 924(c)'s maximum of life imprisonment. The decision below rejected the anomalies raised by the government, recognizing that any apparent "anomaly disappears upon close scrutiny because 'no court would be *required* to sentence the five-kilogram defendant to only the ten-year minimum. That defendant would face a maximum sentence of life . . . .'" Pet. App. 16a (quoting *Whitley*, 529 F.3d at 155). "If the 'except' clause subjected more serious drug offenders to a lower *maximum* sentence than less serious drug offenders, the Government's anomaly argument would have some force." *Whitley*, 529 F.3d at 155. Sentencing judges continue to have discretion to raise sentences to calibrate them to blameworthiness and dangerousness, subject to a floor established by § 924(c). It is entirely rational to read § 924(c) as creating a floor of at

least five, seven, or ten years imprisonment but not requiring stacking of one mandatory-minimum sentence on top of a second, higher one. *Id.* (describing Congress's "reasoned judgment" on this point as "eminently sound"). It thus leaves sentencing judges some discretion instead of requiring them to raise double-digit sentences still further.

Second, the U.S. Sentencing Guidelines also resolve the government's supposed anomaly. They go beyond mandatory minimums to calibrate sentences and prevent supposed absurdities. The Guidelines for drug-trafficking crimes require a two-level increase in the base offense level for possession of a firearm. *See* U.S. Sentencing Guidelines Manual § 2D1.1(b)(1) (2007). In the government's example, the more-serious defendant who possessed at least five kilograms of cocaine would face a base offense level of 32, plus the two-level firearm enhancement. *See id.* § 2D1.1(b)(1), (c) (2007). Put more precisely, the Guidelines specify a sentencing range of 151 to 188 months for a defendant with no criminal history. The low end of the range, 12 years and 7 months, exceeds the mandatory-minimum sentence applicable to the less-serious offender hypothesized by the government. Thus, if the government is concerned that the defendant convicted of possessing a greater amount of narcotics will receive a lesser sentence, that concern is illusory. The Sentencing

Guidelines would give the court ample authority to impose a greater sentence for the defendant who committed the graver crime.[1]

Finally, if there were any question whether the "except" clause included predicate narcotics offenses, the rule of lenity rather than the absurdity canon would answer it. Even if it is ambiguous whether Congress intended to preclude consecutive minimum sentences, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States v. Bass*, 404 U.S. 336, 347 (1971) (internal quotation marks omitted); *accord Busic*, 446 U.S at 407.

II. The Circuit Split Is Immature, Lopsided, and Poorly Developed

1. Although there is a circuit split on this issue, it does not warrant this Court's review. First, the government exaggerates its depth. For example, while the government cites *United States v. Jolivette*, 257 F.3d 581 (6th Cir. 2001), that case addressed the "except" clause only in dicta: the case did not involve crimes that otherwise

[1] While the Sentencing Guidelines are now advisory, sentences remain subject to appellate review for reasonableness, and the Guidelines remain useful benchmarks to reduce unwarranted disparities of the sort the government fears. *See United States v. Booker*, 543 U.S. 220, 245 (2005) (remedial majority opinion); *Gall v. United States*, 522 U.S. 38, 45-50 (2007).

included mandatory-minimum sentences. *Id.* at 587 ("Neither subsection (a) nor subsection (d) of § 2113 contains a minimum sentence . . . .").

2. The remaining split is immature, so this Court should deny review to allow time for further and fuller development in the lower courts. Most of the circuits that have construed the "except" clause have done so only fleetingly or recently. In *London*, for example the Fifth Circuit construed the "except" clause in a passing paragraph, referring to an unpublished, non-precedential decision. *United States v. London*, 568 F.3d 553, 564 (5th Cir. 2009) (citing *United States v. Collins*, 205 Fed. App'x 196 (5th Cir. 2006)); 5th Cir. R. 47.5.4.

Moreover, none of the cases cited by the government was reheard *en banc*, and none grounded its analysis in *Gonzales* or *Busic*. Instead, the circuits either simply follow other cases on the same side of the split, *see, e.g.*, *United States v. Studifin*, 240 F.3d 415, 422-23 (4th Cir. 2001) (discussing *United States v. Alaniz*, 235 F.3d 386, 386-90 (8th Cir. 2000), *cert. denied*, 533 U.S. 911 (2001)); *United States v. Segarra*, 582 F.3d 1269, 1272-73 (11th Cir. 2009), or cite the legislative history to avoid the section's plain language. *See, e.g.*, *Alaniz*, 235 F.3d at 386-90. The circuits may still resolve this young conflict by reconsidering their precedents *en banc* in light of the Second Circuit's reliance on *Gonzales*.

The Second Circuit is the only circuit to have considered how *Gonzales*'s analysis should inform the reading of § 924(c)'s "except" clause and its use of the word "any." The Second Circuit did so in *Whitley*, 529 F.3d at 156, a decision the government concedes is the intellectual precursor to this case. *See* Pet. 4-7. Because *Gonzales* is this Court's closest authority and only the Second Circuit has considered its guidance, this Court should await further decisions from other circuits that directly address *Gonzales*'s relevance to the "except" clause.

Most of the cases that make up the split are quite recent. Four of the six cases on which the government relies to demonstrate a split are 2009 cases. *See, e.g.*, *Segarra*, 582 F.3d at 1272; *London*, 568 F.3d at 564; *United States v. Pulido*, 566 F.3d 52, 65 & n.6 (1st Cir. 2009); *United States v. Easter*, 553 F.3d 519, 525 (7th Cir. 2009) (per curiam). Even the Second Circuit's analysis is relatively new. The Second Circuit denied rehearing in this case only this past June, *see* Pet. 1, and denied rehearing in *Whitley* only in August of last year, *Whitley*, 540 F.3d at 87. This Court should await further percolation before intervening.

3. As the government concedes, the circuit split it identifies is lopsided. *See* Pet. 18. This Court should await fuller development of

the split and a wider range of reasoned decisions to inform its consideration of the issue.

4. Finally, this Court should wait to review a future case because this case is interlocutory, as the Second Circuit remanded it for resentencing. On remand, the district court will have discretion to impose a sentence below fifteen years or not. Pet. App. 19a-20a. It is too early to predict whether Mr. Williams will ultimately receive a lower sentence than the government's construction of § 924(c) would allow.

CONCLUSION

For the foregoing reasons, respondent respectfully asks this Court to deny the government's petition for certiorari.

Respectfully submitted,[a]

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(2)

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In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

LEON WILLIAMS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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18 U.S.C. 924(c)(1)(A) 1

In the Supreme Court of the United States

No. 09-466

UNITED STATES OF AMERICA, PETITIONER

v.

LEON WILLIAMS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

As the government explained in the petition for a writ of certiorari, this Court's review is necessary to resolve a deep and entrenched circuit conflict concerning the correct interpretation of the introductory "[e]xcept" clause of 18 U.S.C. 924(c)(1)(A). The Second Circuit's erroneous interpretation of that clause in the decision below and in *United States* v. *Whitley*, 529 F.3d 150 (2d Cir. 2008), eliminates any term of imprisonment for a Section 924(c) conviction whenever a defendant is also convicted of a related offense that carries a higher mandatory minimum sentence. None of the eight other courts of appeals to consider the issue have accepted the Second Circuit's reading of the "except" clause. See Pet. 18-19. In those circuits, a defendant would receive a mandatory minimum term of imprisonment for violating Section 924(c) regardless of whether he was also

subject to a different mandatory minimum for another offense.

Respondent agrees that the conflict exists and does not dispute that the issue is important and recurring. Instead, he primarily focuses on the merits of the question presented, contending that the decision below is correct. He also argues that the nature of the circuit conflict and the posture of this case render certiorari inappropriate. Those contentions lack merit. The decision below is erroneous, the circuit conflict is fully developed, the conflict will not disappear without this Court's intervention, and this case presents a suitable vehicle to resolve it. Further review is therefore warranted.

1. Respondent acknowledges that there is a conflict between the courts of appeals on the question presented, but he contends that the conflict "may still resolve" itself without intervention by this Court. Br. in Opp. 13. That is highly unlikely. In both the decision below and *Whitley*, the Second Circuit denied the government's petitions for rehearing en banc asking the court to reconsider its position in light of the circuit conflict. Similarly, the courts of appeals that have rejected the Second Circuit's view have indicated no inclination to revisit their position in light of the Second Circuit's contrary interpretation. Since the Second Circuit issued *Whitley* and the decision below, three courts of appeals have reaffirmed their positions in separate panel decisions. See *United States* v. *Tate*, No. 09-10288, 2009 WL 3490293, at *8-*9 (11th Cir. Oct. 30, 2009); *United States* v. *Pulido*, 566 F.3d 52, 65 & n.6 (1st Cir. 2009), petition for cert. pending, No. 09-5949 (filed Aug. 14, 2009); *United States* v. *London*, 568 F.3d 553, 564 (5th Cir. 2009), petition for cert. pending, No. 09-5844 (filed Aug. 11, 2009). And a number of courts of appeals have rejected oppor-

tunities to review the issue en banc in light of the decision below and *Whitley*. See, *e.g.*, *United States* v. *Gould*, 329 Fed. Appx. 569 (5th Cir. 2009) (per curiam), petition for cert. pending, No. 09-7073 (filed Oct. 16, 2009); *United States* v. *Abbott*, 574 F.3d 203 (3d Cir. 2009), petition for cert. pending, No. 09-479 (filed Oct. 19, 2009); *United States* v. *Acosta*, 333 Fed. Appx. 159 (8th Cir. 2009) (per curiam), petition for cert. pending, No. 09-7131 (filed Oct. 19, 2009); *United States* v. *Easter*, 553 F.3d 519, 525-527 (7th Cir. 2009) (per curiam), petitions for cert. pending, No. 08-9560 (filed Mar. 26, 2009), and No. 08-10584 (filed May 20, 2009).

Respondent argues that the circuit conflict is "young" and "immature" because "[m]ost of the cases that make up the split are quite recent." Br. in Opp. 13-14. But the numerous recent decisions addressing this issue simply illustrate that the question presented frequently arises. The arguments and competing positions have been fully developed and addressed in the courts of appeals. Indeed, five courts of appeals have announced their position after the Second Circuit adopted its interpretation of the "except" clause. See *United States* v. *Segarra*, 582 F.3d 1269, 1272-1273 (11th Cir. 2009) (per curiam); *Abbott*, 574 F.3d at 208-209; *London*, 568 F.3d at 564; *Pulido*, 566 F.3d at 65 & n.6; *Easter*, 553 F.3d at 525-527.* In doing so, four of those courts specifically considered and rejected the Second Circuit's contrary reasoning. See *Segarra*, 582 F.3d at 1272; *Abbott*, 574 F.3d at 209-211; *Pulido*, 566 F.3d at 65 n.6; *Easter*, 553

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* Although *Easter* was issued before the decision below, it was decided after *Whitley*, in which the Second Circuit established the interpretation of Section 924(c) to which it adhered in this case.

F.3d at 525-527. The question presented is ready for review by this Court.

2. Respondent does not dispute that the issue presented here is important and recurring. Because defendants are frequently convicted of both a Section 924(c) offense and a predicate offense that carries a higher mandatory minimum sentence, the question presented affects a large number of cases. Absent this Court's review, defendants in those cases will be subject to disparate mandatory sentences depending on the jurisdiction in which they are prosecuted. See Pet. 19-20. The volume of pending petitions in this Court presenting the issue demonstrates the frequency with which it arises. See, *e.g.*, *Garton* v. *United States*, petition for cert. pending, No. 09-7433 (filed Oct. 20, 2009); *Abbott* v. *United States*, petition for cert. pending, No. 09-479 (filed Oct. 19, 2009); *Acosta* v. *United States*, petition for cert. pending, No. 09-7131 (filed Oct. 19, 2009); *Vargas* v. *United States*, petition for cert. pending, No. 09-7127 (filed Oct. 19, 2009); *Gould* v. *United States*, petition for cert. pending, No. 09-7073 (filed Oct. 16, 2009); *Wadford* v. *United States*, petition for cert. pending, No. 09-7168 (filed Sept. 8, 2009); *London* v. *United States*, petition for cert. pending, No. 09-5844 (filed Aug. 11, 2009); *Pulido* v. *United States*, petition for cert. pending, No. 09-5949 (filed Aug. 14, 2009); *Lee* v. *United States*, petition for cert. pending, No. 09-5248 (filed July 9, 2009); *McSwain* v. *United States*, petition for cert. pending, No. 08-9560 (filed Mar. 26, 2009); see also, *e.g.*, *United States* v. *Haynes*, 582 F.3d 686, 712 (7th Cir. 2009) (noting that the defendant had raised the "except" clause issue in order to preserve it "for review in the Supreme Court"). This Court's resolution of the circuit conflict is necessary.

3. This case squarely presents the "except" clause issue. See Pet. 20-21. There is no merit to respondent's contention (Br. in Opp. 15) that review is inappropriate because the court of appeals remanded for resentencing. While many criminal cases in an interlocutory posture do not warrant this Court's review, this case exemplifies the situation in which certiorari is justified, because the need for a remand was created by the ruling from which the government seeks review. The Court has in other cases granted the government's petition for a writ of certiorari in federal criminal cases in which a court of appeals has remanded for further proceedings, but a controlling legal issue that will govern further proceedings warrants the Court's attention. See, *e.g.*, *United States* v. *Ressam*, 474 F.3d 597, 599 (9th Cir. 2007) (remanding for resentencing after reversing imposition of mandatory minimum), rev'd, 128 S. Ct. 1858 (2008); *United States* v. *Gonzalez-Lopez*, 399 F.3d 924, 935 (8th Cir. 2005) (remanding for new trial), aff'd, 548 U.S. 140 (2006); *United States* v. *Grubbs*, 377 F.3d 1072, 1080 (9th Cir. 2004) (remanding to permit withdrawal of conditional guilty plea), rev'd, 547 U.S. 90 (2006); *United States* v. *Booker*, 375 F.3d 508, 514 (7th Cir. 2004) (remanding for resentencing), aff'd, 543 U.S. 220 (2005); *United States* v. *Putra*, 78 F.3d 1386, 1390 (9th Cir. 1996) (same), rev'd *sub nom. United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam); *United States* v. *Gonzales*, 65 F.3d 814, 823 (10th Cir. 1995) (same), vacated, 520 U.S. 1 (1997). Because the proper interpretation of the "except" clause is "fundamental to the further conduct of the case," *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945), this Court's review is warranted at this time.

4. Respondent devotes his brief in opposition primarily to defending the decision below on the merits. Br. in Opp. 2-12. In general, respondent's arguments paraphrase the Second Circuit's reasoning, and as the government explained in the petition, that reasoning is erroneous. See Pet. 9-18.

Respondent attempts to supplement the Second Circuit's reasoning by placing particular emphasis on *United States* v. *Gonzales*, 520 U.S. 1 (1997), contending that it compels the result below. Br. in Opp. 6-8. That argument is incorrect. In *Gonzales*, this Court interpreted the phrase "any other term of imprisonment" in a previous version of Section 924(c) to denote any federal or state term of imprisonment. 520 U.S. at 5. But while any has an "expansive" meaning, *ibid.*, that word, like all others, must be read in context, and this Court has often recognized that "any" does not automatically reach all objects indiscriminately. See *Small* v. *United States*, 544 U.S. 385, 388 (2005) (statutory phrase "convicted in any court" does not answer whether it applied to foreign courts); *Nixon* v. *Missouri Mun. League*, 541 U.S. 125, 132 (2004) ("any" means "different things depending upon the setting"); *United States* v. *Alvarez-Sanchez*, 511 U.S. 350, 357 (1994) (declining to construe phrase "any" law enforcement officer "without considering the rest of the statute"). "Thus, even though the word 'any' demands a broad interpretation, * * * [courts] must look beyond that word itself." *Small*, 544 U.S. at 388 (citation omitted). As eight courts of appeals to consider the issue have concluded, reading the term "any" in the context of the "except" clause to include literally any provision of law ignores the surrounding language of the statute and contravenes related subsections of Section 924(c). See Pet. 10-16.

Indeed, in the decision below, the Second Circuit itself declined to adopt respondent's purportedly "literal" reading of the phrase "any other provision of law." The court deemed "suspect" an "unbounded" reading of Section 924(c), under which the term "any" would literally "include, for example, provisions under which a defendant was already sentenced for a prior unrelated crime." Pet. App. 9a-10a. The Second Circuit therefore engrafted onto the "except" clause a limitation to offenses arising from the "same criminal transaction," *id.* at 10a, whether or not charged in the same indictment or information, *id.* at 10a n.4. But as the government has explained, Pet. 13-14, that interpolation is both unsupported by the statutory text and unnecessary to effectuate the statute's plain meaning. The "unbounded" reading of the "except" clause the court sought to avoid arose only because the court failed to observe the limitation inherent in the statute itself—that the clause applies only where another provision of law prescribes a greater mandatory minimum for the Section 924(c) offense.

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For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General

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